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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SEAN LEROY MUNSHOWER, Defendant and Appellant.	H041691 (Santa Clara County Super. Ct. No. C1362334)

A jury found defendant Sean Leroy Munshower guilty of elder abuse for assaulting his father at a bar in Milpitas. (Pen. Code, § 368, subd. (b)(1).)[1] The jury found true the allegation that defendant personally inflicted great bodily injury in the commission of the offense. (§ 12022.7, subd. (c).) The trial court sentenced defendant to a total term of eight years in prison.

At trial, defendant's father denied that defendant had assaulted him. Instead, he testified he was injured as the result of a fall.

On appeal, defendant contends the trial court erred by admitting hearsay statements from his father's hospital records describing the incident as an assault. The trial court conditionally admitted the statements as either prior inconsistent statements by the victim or for the nonhearsay purpose of explaining the treating physician's actions.

[1] Subsequent undesignated statutory references are to the Penal Code.

Defendant claims the trial court erred because the prosecution failed to put forth evidence sufficient to establish the identity of the declarant.

We conclude the trial court's admission of the challenged evidence was not an abuse of discretion. Accordingly, we will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Offense*

The prosecution accused defendant of assaulting his elderly father, Pierre Davis, outside the Galaxy bar in Milpitas in August 2013. A bartender testified that she saw defendant shove Davis, hit him in the face, and throw him to the ground. Davis suffered a laceration to his forehead, a dislocated shoulder, and a concussion. At trial, Davis claimed he suffered these injuries as the result of a fall.

1. *Testimony of Alycia Armstrong*

Alycia Armstrong, a bartender at the Galaxy, testified as follows. The Galaxy is a local bar that is "totally dive." Davis was a longtime "beloved" regular at the Galaxy. Armstrong, who worked at the Galaxy five days a week, saw Davis at the bar two or three days a week. Davis was always drunk. The bartenders were trained with "a system for Pierre specifically" which included calling his wife to pick him up. Defendant also patronized the bar, but not as often as Davis. Armstrong knew defendant was Davis' son.

Around 5:50 p.m. on August 10, 2013, Armstrong drove to the Galaxy to begin her shift. As she pulled into the parking lot behind the bar, she saw defendant and Davis outside, next to the back door. The area outside the back of the bar had several white plastic chairs where patrons could smoke and "hang out." Davis was seated in one of the chairs, and defendant was standing in front of him gesturing with his hands in an aggressive manner. Because her car window was down, Armstrong could hear loud talking between them. Armstrong "felt like something was not right," so she got out of her car and approached the two men.

When Armstrong was about 22 feet away from the two men, she saw Davis get up out of his chair. At that point, defendant pushed Davis in the chest, hit him in the face, grabbed his head, and threw him to the ground. Davis' head hit the ground. Armstrong then ran into the bar, told another bartender to grab some towels, and called the police.

Davis was lying on the ground. He was unable to speak and he could not move his arm. His forehead was bleeding. Armstrong screamed at defendant and told him she was calling the police. At first, defendant tried to leave the bar. But Armstrong screamed at him not to leave, and other patrons were "getting involved," so he stayed. Defendant apologized repeatedly to Davis.

Davis subsequently approached Armstrong and told her it was a "family matter" that he did not believe belonged in court.

2. *Testimony of Officer Doll*

Officer Jason Doll of the Milpitas Police Department testified as follows. At 5:43 p.m. on August 10, 2013, Officer Doll received a radio call of an assault at the Galaxy. He described the Galaxy as a "dive bar" that "tends to attract trouble." When Officer Doll drove up to the rear of the building, he saw Davis lying on the ground with defendant standing over him. Davis was bleeding from the head and appeared to be in pain. Defendant was holding paper towels to Davis' head. There was blood on the ground consistent with a head wound. Davis could not answer any questions. He could not tell Officer Doll where he was or what had happened. Davis was complaining about his shoulder and he wanted his wallet. At some point, paramedics arrived and began treating Davis.

The next day, Officer Doll spoke with Davis at the hospital. Davis said he did not remember what had happened. He only remembered walking out the door, and all of a sudden the police and paramedics were there. Davis did not think defendant had hit him. Davis stated that defendant "would have hit him in the face more." At some point in the conversation, Davis said he had fallen.

3. *Testimony of Pierre Davis*

Pierre Davis testified as follows. He was born in 1938 and was 76 years old at the time of trial. Defendant did not get along with Davis' wife, who was not defendant's biological mother.

Davis had been going to the Galaxy since 1961. He sometimes went there as often as three times a week. On August 10, 2013, Davis and defendant went to the Galaxy together in Davis' truck. Davis drank three or four shots of Jack Daniel's whiskey that day. Davis testified that he usually walked with a cane, but he did not bring his cane the day of the incident because he did not want people to know he was handicapped.

When Davis was ready to go home, someone called his wife to come pick him up. Davis went outside to lock his truck in the back parking lot, and defendant came out after him. Davis said his wife was coming to pick him up. Defendant began walking away because he did not want to be picked up by Davis' wife. At that point, defendant testified that he fell down in front of his truck. He fell because he did not have his cane. He denied that defendant shoved him, hit him, or threw him down.

Davis talked with Officer Doll at the hospital, but Officer Doll never asked him how he got hurt. Davis never told the doctor he was assaulted by anyone. Davis told the doctors in the emergency room that he fell.

4. *Testimony of Dr. Daniel Nelson*

Dr. Daniel Nelson, an emergency room physician at Regional Medical Center in San José, testified as follows. Dr. Nelson's only recollection of treating Davis was based on the medical records. The medical records were created by scribes who digitally record interactions between the patient and the doctor or other hospital staff. The medical records indicated that Davis' mental status was "altered," meaning he did not provide satisfactory answers to the staff's questions. Davis appeared intoxicated, and his blood alcohol level was elevated.

Dr. Nelson diagnosed Davis with a dislocated shoulder, a concussion, a contusion, and a superficial laceration on the left eyebrow. The laceration was three centimeters long.

At several places in the medical records, the cause of the injuries was recorded as an "assault." In the "history" section of the records, the "chief complaint" was listed as "reported physical assault." In the same section, the "reported assailant" was listed as "person unknown to patient," and the records stated "patient was reportedly pushed." The same term—"assault"—was recorded in other places in the medical records. In the "triage" section, for example, the records listed "stated physical assault," followed by "family relative."

Dr. Nelson did not know precisely who made the statements reporting an assault. He testified that the statements were made by either Davis or the emergency medical services (EMS) personnel—i.e., the ambulance staff. Dr. Nelson relied on the statements in making his diagnoses.

B. *Procedural Background*

The prosecution charged defendant with one count of elder abuse under circumstances likely to produce great bodily harm or death. (§ 368, subd. (b)(1).) The information also alleged defendant personally inflicted great bodily injury on a person aged 70 years or older. (§ 12022.7, subd. (c).)

The case proceeded to trial in October 2014. The jury found defendant guilty as charged and found true the great bodily injury enhancement. The trial court imposed a total term of eight years in prison, consisting of the middle term of three years with a consecutive five-year term for the enhancement.

II. DISCUSSION

Defendant contends the trial court erred by admitting hearsay statements in the medical records indicating that Davis' injuries were the result of an assault. He contends the prosecution failed to establish the necessary foundation for admission as prior

inconsistent statements because the evidence was insufficient to show that Davis was the declarant. The Attorney General argues that the trial court properly admitted the statements conditional on the jury's finding that Davis made the statements, or alternatively for the nonhearsay purpose of showing that Dr. Nelson had relied on them to treat Davis.

A. *Procedural Background*

The prosecution moved in limine for the admission of the challenged statements as prior inconsistent statements by Davis under Evidence Code section 1235. In the alternative, the prosecution offered the statements for the nonhearsay purpose of showing that Dr. Nelson relied on them in forming his diagnoses. Defendant objected on the ground that the prosecution could not show defendant made the challenged statements. The court initially deferred ruling on the motion pending Dr. Nelson's testimony.

At trial, Dr. Nelson testified as set forth in detail in Section II.A.4. above. As relevant here, Dr. Nelson testified that the statements in the medical records concerning the alleged assault were made by either Davis or the EMS personnel. With the exception of certain statements in one section of the records, Dr. Nelson testified that he relied on the statements for his diagnoses. Defendant renewed his objection to the admission of the statements.

The trial court excluded the statements on which Dr. Nelson did not rely, but it admitted the remaining statements concerning the alleged assault subject to the following instructions. If the jury found Davis made the statements, then it could use those statements for two purposes: First, to evaluate whether Davis' in-court testimony was believable; and second, as evidence that the statements were true. The court then instructed the jury that if it found Davis did *not* make the statements, but rather that the statements came from EMS personnel, then the jury could not consider the statements for their truth. The jury was also instructed that under this second finding, it could consider the statements only as a basis for Dr. Nelson's and the medical staff's treatment of Davis.

B. *Legal Principles*

Evidence Code section 1235 (inconsistent statements) provides that evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his or her testimony at the hearing. The proponent of such hearsay has the burden to lay the proper foundation. (Evid. Code, § 403, subd. (a); *People v. Livaditis* (1992) 2 Cal.4th 759, 778.) The rule requires the proponent of the evidence to show that the offered hearsay statement was made by the witness who gave the inconsistent testimony. An out-of-court statement that is not "offered to prove the truth of the matter stated" is not made inadmissible by the hearsay rule. (Evid. Code, § 1200; *People v. Jaspal* (1991) 234 Cal.App.3d 1446, 1462.) Such nonhearsay purposes include showing that the listener acted in reliance on the out-of-court statement. (*Cantrell v. Zolin* (1994) 23 Cal.App.4th 128, 133.)

Evidence Code section 403 governs the determination of certain foundational facts underlying the admissibility of evidence. As relevant here, evidence covered by Evidence Code section 403 "is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself [or herself]." (Evid. Code, § 403, subd. (a)(4).) Under this rule, the court may admit the proffered evidence conditionally "subject to evidence of the preliminary fact being supplied later in the course of the trial." (Evid. Code, § 403, subd. (b).) Subdivision (c) further provides: "If the court admits the proffered evidence under this section, the court: [¶] (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist. [¶] (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists." (Evid. Code, § 403, subd. (c).)

"We review a trial court's ruling on the sufficiency of the foundational evidence under an abuse of discretion standard." (*People v. Tafoya* (2007) 42 Cal.4th 147, 165.)

C. *The Trial Court's Admission of the Challenged Statements Was Not an Abuse of Discretion*

In admitting the challenged statements for their truth conditional on the jury's finding that Davis made the statements, the court followed the procedure set forth in Evidence Code section 403. Defendant does not contend the trial court erred by allowing the jury to consider the challenged statements for the nonhearsay purpose of Dr. Nelson's reliance on the statements to treat Davis. Rather, defendant contends the court erred in allowing the jury to decide whether Davis made the statements under Evidence Code section 403 because the finding of that foundational fact was governed by Evidence Code section 405, which assigns the task of foundational fact-finding to the trial court. For this proposition, defendant relies on *People v. Cottone* (2013) 57 Cal.4th 269 (*Cottone*).

Defendant is correct that Evidence Code section 405 requires the trial court to find certain foundational facts necessary for a hearsay exception, but the identity of the declarant is not one of them. As set forth above, Evidence Code section 403 expressly includes the identity of the declarant among those factual findings delegated to the jury. (Evid. Code, § 403, subd. (a)(4).) "By contrast, [Evidence Code] section 405 'deals with *evidentiary rules* designed to withhold evidence from the jury because it is too unreliable to be evaluated properly *or because public policy requires its exclusion*.' " (*Cottone, supra,* 57 Cal.4th at p. 284, quoting Assem. Com. com., reprinted at 29B pt. 1B West's Ann. Evid.Code, (2011 ed.), foll. § 405, p. 41.)

Under Evidence Code section 403, the trial court may exclude the proffered evidence only if the evidence is insufficient to support a jury's finding as to the necessary foundational facts. "A judge screening proffered evidence under section 403 excludes it only upon a finding that the showing of such a preliminary fact ' "is too weak to support

a favorable determination by the jury." ' " (*Cottone*, at pp. 283-284, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 466.)

Defendant contends the trial court should not have assigned the fact-finding function to the jury because the jury had insufficient evidence to determine whether the statements were made by Davis or the EMS personnel. We disagree. The jury reasonably could have inferred that Davis made the statements based on the contents of the statements themselves, such as the claim that the assault was perpetrated by a family member. We thus conclude the trial court did not abuse its discretion in delegating the finding of this fact to the jury.

Even assuming it was error to admit the challenged statements, defendant cannot show he was prejudiced. First, there is no indication the jury actually considered the statements for their truth. Indeed, the jury may have concluded Davis did not make the statements at all. Second, it is not reasonably likely the jury would have credited Davis' testimony even if the statements in the medical records been excluded. Armstrong provided credible, consistent testimony as an eyewitness to the assault, and she had no motive to provide false testimony. By contrast, the record established that Davis was biased in favor of his son, as evidenced by his statement to Armstrong that this was a "family matter" that did not belong in court.

For these reasons, we conclude defendant's claim is without merit. Accordingly, we will affirm the judgment.

III. DISPOSITION

The judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Rushing, P. J.

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Premo, J.